

Kansas Department of Health And Environment
Bureau of Waste Management Policy 00-03

related to

Enforcement Settlements

Revised June 18, 2008

Background

The Kansas Department of Health and Environment (KDHE) has the statutory authority to issue penalties and administrative orders to any person who violates Kansas environmental statutes or regulations. The administrative order may direct the violator to take actions, pay penalties, or create procedures to lessen or eliminate the threat to human health and the environment caused by the violation. Each statute also allows the respondent to appeal an administrative order. The Kansas Statutes Annotated (K.S.A.) 77-505, within the Kansas Administrative Procedures Act (KAPA), allows for the settlement of administrative orders. KDHE may offer certain respondents the option of settling by paying a portion of their penalty and/or performing a Supplemental Environmental Project (SEP) in lieu of paying the entire penalty. KDHE may also settle by allowing the payment of the penalty in installments rather than one lump sum.

Settlement Options

There are two options that may be utilized in developing an acceptable settlement, or a combination of these options may be utilized.

1. Performance of Supplemental Environmental Projects (SEPs) as described in subsequent sections of this policy.
2. Payment of the penalty in one lump sum or in incremental payments over a period not to exceed two years.

Settlement Eligibility

1. Timeliness- The respondent must propose the settlement at least four weeks before the scheduled hearing of the case. The proposal of a settlement cannot be used as a tactic to delay the commencement of a scheduled hearing.
2. Compliance history- Inspection records and regulatory compliance records with KDHE and/or other state or federal environmental agencies will be used to determine the respondent's compliance history. This history will be used in determining the minimum SEP value if a SEP is to be included in the settlement.
3. Compliance status- The respondent must have corrected the violations cited during the inspection before KDHE will approve a settlement proposal, and the respondent must be in compliance with all other KDHE environmental regulations including, but not limited to air, water, and remediation.
4. Technical and economic capability- The respondent must be technically and economically capable of completing the proposed settlement. Evidence demonstrating capability may be required and could include submission of company financial information. Evidence

demonstrating technical capability may also be required as part of the settlement negotiations.

5. Environmental benefits-The respondent must estimate the quantifiable environmental benefits that will accrue from the performance of a SEP. Completion of a SEP should result in the intended effect and must be quantified and documented. Full documentation of the completed SEP will be required. If the results cannot be quantified, some other measure will be used as agreed upon by both parties.
6. Economic benefit of noncompliance- KDHE may deny the SEP proposal if it determines respondent gained a significant economic benefit by violating the statutes and regulations, or this economic benefit may be added to the total penalty amount and included as part of the settlement.
7. Previous Enforcement Action - Anyone who has been penalized or entered into a settlement with the KDHE Bureau of Waste Management for violations of environmental law in the previous five years is not eligible for a SEP under this policy.

SEP Criteria

1. A SEP may not be allowed if the primary objective and result is the improvement of the respondent's economic self-interest.
2. The proposed SEP must improve the damaged environment or reduce the total risk posed to human health and the environment caused by the respondent's business or operations.
3. The proposed SEP should, if at all possible, directly relate to improving waste management issues (solid or hazardous depending on violations) or waste handling problems within the industry in which the violation took place.
4. Activities that may be required by statute or regulation or that may be obtained as injunctive relief by KDHE pursuant to applicable statutory or case law shall not be eligible as a SEP. (i.e. all SEPs must go above and beyond what is required by regulation).
5. SEPs cannot be planned or budgeted for prior to the issuance of the subject violations and cannot have been a part of the corrective actions for those violations. SEPs should not be started until a signed Consent Agreement and Final Order (CAO) is in place, and may be rejected if initiated before all parties have signed the CAO.

Project Costs

1. The total cost of the SEP must equal or exceed three times the amount of the assessed penalty unless the respondent meets the definition of a "small business" as follows:

Hazardous Waste:

- (i) On a corporate basis, the company annually employs 100 or fewer full time individuals or full time equivalents, **and**
- (ii) The facility routinely generates less than 1000 kilograms (2,200 pounds) of hazardous waste in a calendar month.

Solid Waste:

A solid waste facility receives, stores, and/or processes not more than an annual average of 20 tons per day of solid waste.

2. If the facility meets the definition of a “small business” as outlined above, the total cost of the SEP must equal or exceed two times the amount of the assessed penalty.

SEP Proposals

1. The results of the SEP must be verifiable and measurable (quantifiable). The respondent must propose how the results of the SEP will be measured and documented and this should be included as part of the SEP proposal. KDHE will review and approve of completion of each SEP. In some cases, a third party audit or verification may be required as part of the settlement (the cost will be included in the CAO). If the results cannot be quantified, some other measure will be used as agreed upon by both parties.
2. Proposal of any SEP must contain a detailed scope of work. The scope of work must include a description of each step of the project, a timetable or schedule, an itemized cost estimate (including labor if applicable), and identification of who will perform the work on the SEP.

Categories Of Eligible SEPs

The following will be considered eligible SEPs.

1. **Site Clean-Up.** Funding all or part of a KDHE clean-up of a solid or hazardous waste site (depending on whether violations were solid or hazardous waste). Site eligibility will be determined by KDHE. Funding may be used for disposal of solid or hazardous waste and/or for contaminated media, if no responsible party has been identified, or if responsible party is unable to clean up the site, and if the site fails to qualify for other available programs. KDHE will attempt to identify eligible sites for interested parties.

If this option is chosen, only 1.5 times the penalty amount will be required for those not meeting the definition of a small business, and only 1.25 times the penalty amount will be required for those who do meet the definition of a small business.

2. **Training.** Due to budget cuts and decreased grant funding, KDHE has had to reduce the amount of training provided to the regulated community as well as to its compliance and enforcement staff. Choosing this option will help fund this necessary training and outreach effort, as designated by KDHE. The benefit of this project will be considered direct, so quantification of the benefit will not be required.

If this option is chosen, only 1.5 times the penalty amount will be required for those not meeting the definition of a small business, and only 1.25 times the penalty amount will be required for those who do meet the definition of a small business.

The CAO will designate one of the following or a combination of the following for this Project:

- a. KDHE designated training - Funds will be put into the Hazardous Waste Management Fund or the Solid Waste Management Fund (depending on the type of violations) and will be used for training KDHE staff or other government agency staff on regulatory issues concerning compliance and enforcement (including but not limited to training on

inspections, investigative techniques, enforcement tools and techniques, and legal issues). The funds will also be used to provide training to the regulated community, including but not limited to the hazardous waste generator workshops, training on new or changing regulations, targeted training (industry specific), and for outreach materials (posters, newsletters, or other materials deemed helpful or necessary).

- b. Midwest Environmental Enforcement Association (MEEA) – MEEA provides training to inspectors, enforcement staff, permit staff, and attorneys on environmental compliance and enforcement. MEEA has agreed that funds contributed through Kansas settlements will be split 25:75 between MEEA’s general training fund, and training of Kansas personnel. All training will be provided at MEEA approved training courses or conferences.
 - c. Kansas Small Business Environmental Assistance Program (SBEAP) – This organization is a 501(3)(c) organization that provides outreach and training to Kansas facilities to help maintain and improve compliance with solid and hazardous waste regulations. SBEAP has agreed that funds contributed through BWM settlements will be split 25:75 between SBEAP’s general training funds and joint BWM/SBEAP outreach activities including hazardous waste generator workshops, outreach materials, and environmental conferences.
 - d. Solid Waste Association of North America (SWANA) of Kansas – This organization has agreed that funds contributed through KDHE settlements will be split 25:75 between SWANA’s general training fund and joint SWANA/KDHE outreach activities including training conferences (this option is for **solid waste** only).
4. **Community Outreach.** This project must be related to the violations issued (solid waste or hazardous waste) and can include a wide variety of off-site projects that benefit human health and the environment of the local community. This project must have direct and measurable benefit to the environment (or human health). Projects can include (but are not limited to) purchasing necessary and specialized equipment for the local hazardous materials team to enable them to respond to local spills and other environmental emergencies (hazardous waste), purchasing necessary equipment or assisting with funding of local household hazardous waste programs (solid waste).
5. **Waste Prevention and/or Reduction-** A waste prevention SEP would prevent the generation or creation of pollution or hazardous waste at the Respondent’s facility. Waste prevention SEPs also include projects that protect natural resources through conservation. Innovative technology or a change in manufacturing processes to eliminate production of a waste stream would be examples of waste prevention SEP. A waste prevention SEP does not include projects that transfer pollution from one media to another. Waste reduction SEPs would reduce the amount of hazardous waste and/or reduce the toxicity of that hazardous waste (or reduce the amount of solid waste generated for solid waste violations).

General Conditions

1. The respondent must sign a written Consent Agreement and Final Order (CAO) which contains the terms of the settlement. The CAO will contain language that make the terms enforceable pursuant to the Kansas Judicial Review Act if the settlement is not completed successfully and within the guidelines and timetables contained in the agreement.
2. Failure to complete the settlement within the deadline established in the final consent agreement could result in the reinstatement of the original penalty as a final order. The SEP should have a completion time of 24 months or less. However, KDHE will consider SEPs of longer duration if the complexity of the SEP, or other factors agreed upon by KDHE, require additional time.
3. Any costs involved in third party oversight of a SEP will be borne by the respondent. KDHE reserves the right to require third party oversight or monitoring of the SEP if necessary. Specific, periodic reports must be submitted to KDHE by any third party monitor as required in the CAO.
4. The respondent must provide all the necessary documents to substantiate costs of each SEP. Documents that need to be provided may include: invoices, receipts, copies of canceled checks for purchases, and payroll and time accounting for employees participating in the project. In most cases, quarterly reports will be required to be submitted to KDHE to document progress of the project.

Conclusion

This policy provides guidance in determining the feasibility of the creation and use of a settlement and is not intended to recognize or offer any statutory or due process right to any respondent to obtain a settlement. SEPs are offered only as a settlement provision at the absolute discretion of KDHE. The terms of any particular settlement agreement are dependent upon the particular factual circumstances. The use of this guidance by staff of KDHE does not create any binding conditions upon KDHE and is not enforceable by the respondent or other member of the public.



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